



Rulemaking 101

Field Regulations

*What they are,
how they come about,
and what violations cost.*

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Field vs. Headquarters Regulations

There is no such thing as a “field regulation” in the Administrative Procedure Act. The Coast Guard refers to regulations as “field regulations” or “headquarters regulations” depending on what office originates the regulation and the regulation’s purpose and effect.

Headquarters regulations originate at Coast Guard headquarters and make a nationwide policy change. For example, the Large Passenger Ship Crew Requirements rulemaking¹ is a headquarters regulation. It applies everywhere, to everyone, from this point forward.

In contrast, field regulations originate at a Coast Guard sector or district office, affect a limited geographic area, and are often of limited duration. For example, a safety zone for a fireworks display would restrict travel through the area around the fireworks launching point during the launching. Of course, there are exceptions to every rule. For example, the Great Lakes Pilotage rate² is published in a headquarters regulation despite applying only to maritime pilots in the Great Lakes area. But generally a rule that applies to a limited area and originates “in the field” is a field regulation.

So how does a field regulation come about? For all the technical language involved, each field regulation follows the same three steps: wanting it, writing it, and getting it published.

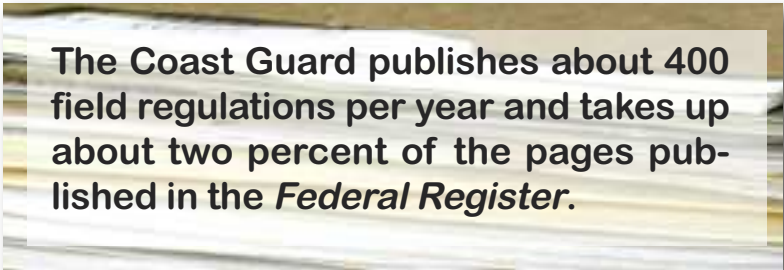
Who Wants a Field Regulation?

As every kindergartener knows, sometimes you want a little space for yourself. And sometimes, you want to use that space to entertain foreign dignitaries³ or take 200 of your closest friends for a swim across the Chesapeake Bay.⁴ The field regulations process starts with the sponsor and the sponsor’s desire for a little bit of room all to himself.

The sponsor can be anybody—an individual, a company, a non-profit organization, a state or local government, or an agency of the federal government. Sponsors start by deciding what they want to do and when they want to do it, then they get in touch with their local Coast Guard sector or district. The sponsor submits information about the event to the appropriate office (see table next page). That office determines which type of field regulation best meets the needs of the event and drafts the regulation.

Writing a Regulation

The drafting process includes, at a minimum, input from the Coast Guard district legal office and an analysis of potential environmental impact. If applicable, a regulation will also involve economic analysis; consultation with state, local, and / or tribal governments; and a host of other considerations required by statute or Executive Order. Once all the pieces are assembled, the



The Coast Guard publishes about 400 field regulations per year and takes up about two percent of the pages published in the *Federal Register*.

STAND BY WHILE I TRANSFER YOU TO THE CORRECT OFFICE

Which office handles which type of regulation depends mostly on the nature of the event and partly on how the Coast Guard Sector office may be organized. Field regulations fall into seven broad categories:

Type of Field Regulation	Purpose	Example	Coast Guard office
Anchorage	Establish anchorage grounds or special anchorage areas for vessels; establish rules for the anchorage.	Middle Ground Anchorage, Annapolis Harbor, Maryland.	Sector Office, Waterways Division
Safety Zone	Protect the public from a hazard; for example, fireworks launches, oil spill cleanup, or active search and rescue cases.	The waters of the St. Johns River in Jacksonville, Fla., within 500 yards of the fireworks barge.	Sector Office, Waterways Division
Security Zone	Protect an asset from harm; for example, a waterfront facility, power plants, or public figures.	The waters of the Susquehanna River near the Three Mile Island power plant.	Sector Office, either the Response or Waterways Division
Special Local Regulations (Regattas and Marine Parades)	Provide separation between the public and participants in a regatta or marine parade.	Searsport lobster boat races the fourth Saturday in August. No non-participating vessel may enter the competition area.	Sector Office, Waterways Division
Regulated Navigation Area	Control vessel traffic in an area with a hazardous condition.	Vessels in the Chesapeake and Delaware Canal must travel at no-wake speed.	Sector Office, Waterways Division
Naval Vessel Protective Zone (NVPZ)	NVPZs are permanent 500-yard rings around large naval vessels (>100-foot).	A 500-yard regulated area around any large (>100-foot) naval vessel.	No originating office. For NVPZ information, contact Sector Office, Response Division.
Bridge Operating Schedule or Deviation	Establish, modify, or temporarily change (temporary means for less than 180 days) a bridge operating schedule.	The schedule for the Broadway Bridge over the Willamette River is changed to require one-hour notification before opening.	District Office, Bridge Division

draft is signed by either the captain of the port (who is usually also the sector commander) or the district commander. The signed regulation goes to the Office of Regulations and Administrative Law (CG-0943) at Coast Guard headquarters in Washington, D.C.

While the electronic copy of the rule arrives instantly via the information superhighway, the Office of the Federal Register requires an original, signed document (or digital signatures that meet a certain standard not yet supported by the Coast Guard). All mail, even overnight delivery from one Coast Guard unit to another, must pass through DHS mail screening procedures; "overnight delivery" typically arrives in four to seven business days.

Getting It Published

At Coast Guard headquarters, the Office of Regulations and Administrative Law reviews the regulation for legal sufficiency, manages submissions to the docket at www.regulations.gov (where regulation-related documents are available for public inspection and com-

ments on the regulation may be made and viewed), and fulfills Coast Guard obligations under the Congressional Review Act.

The headquarters staff also serves as the Coast Guard liaison to the Office of the Federal Register. The Office of the Federal Register manages submissions to the *Federal Register* and the Code of Federal Regulations. Signed originals, certified copies, and electronic files are delivered by courier.

In addition to the requirements of the Office of the Federal Register, the Congressional Review Act requires an agency to send any final rules to the House of Representatives, the Senate, and the Government Accountability Office. This provides Congress the opportunity to overturn the final rule through its legislative power. Of the approximately 5,200 field regulations published since the passage of the Congressional Review Act in 1996, exactly zero have been overturned by Congress.⁵

Still, two paper copies (and one electronic copy) of each final rule are sent over for every regulation.

What Do You Get for Your Efforts?

Regulations published in the *Federal Register* are assumed to be known by all persons, whether they actually read it or not. If a regulation has been published in the *Federal Register*, ignorance of the law is no excuse. If a regulation is not published in the *Federal Register*, the Coast Guard must prove that the mariner knew about

the regulation (“actual notice” instead of “constructive notice”) before the Coast Guard may assess a penalty or enforce a notice of violation.

Is it worth the trouble of publishing field regulations? It costs the Coast Guard \$489 to publish a page in the *Federal Register*.⁶ An average field regulation runs about three pages (often more, occasionally less), and the Coast Guard publishes about 400 field regulations each year. But without publication (and the constructive notice publication conveys), the Coast Guard would have to provide actual notice to any person it wanted to enforce a field regulation against. If the matter ever went to court, the Coast Guard would need the testimony of witnesses who may have transferred or left the service, and those witnesses would have to remember what they said, to whom, and when. Publication (and the constructive notice that comes with it) is as much of an aid in court as it is on the water.

Finally, Administrative Procedure Act rulemaking is a technical and complicated process. The reviews provided at the sector, district, and headquarters levels contribute to a more understandable, more effective, and more enforceable regulation.

WHAT IS THE OFFICE OF THE FEDERAL REGISTER?

The Office of the Federal Register (OFR) publishes federal regulations, presidential proclamations, and other documents required to be published by law. The OFR's editors are the last line of defense against error and ambiguity in the *Federal Register* and the Code of Federal Regulations.

OFR is part of the National Archives and Records Administration, so in addition to keeping track of the nation's critical drawbridge schedule deviations, they also have a copy of the Constitution somewhere.

WHAT GOES ON AT THE OFR?

When a rule gets to the Office of the Federal Register, it first goes to the receiving/scheduling unit. This unit is the master of OFR's tracking system and index, which, considering that OFR published something north of 40,000 separate documents in 2008, is no small task.

Next the document travels to the scheduling portion of that unit, where a scheduling editor ensures (among other things) that the rule is clear in meaning and consistent in form with the rest of the Code of Federal Regulations. Changes to the document are coordinated by the scheduling editor and the agency's Federal Register liaison, a person designated by the agency to receive feedback and coordinate changes to submissions.

The third OFR stop for documents bound for publication is the daily issue unit, where effective dates and “comments must be received by” dates are inserted and each issue is compiled.

Rule documents that amend the Code of Federal Regulations make a fourth stop at the CFR unit, which publishes both the electronic and paper copies of the Code of Federal Regulations.

SOME FUN FACTS

The Coast Guard is one of only two agencies that routinely publish temporary rules of limited geographic area. The other is the Federal Aviation Administration, which publishes temporary flight restrictions prohibiting flight over national security events, natural disasters, and the like. The IRS occasionally issues rules of temporary duration, but since at least one “temporary” rule was in effect for 23 years,¹ its definition of temporary may be different from yours.

Endnote:

¹ 65 Fed. Reg. 3589, Jan. 24, 2000.



The Federal Register, published every business day.



The Hawaii Superferry caused a great deal of controversy and generated a number of field regulations. USCG photo.

How Do I Find Out About Field Regulations in my Area?

Field regulations are published in the *Federal Register* when they are issued and in each Coast Guard district's local notice to mariners when they go into effect. The *Federal Register* is available in paper and electronic form from the Office of the Federal Register (<http://www.federalregister.gov>). Interested persons may sign up to receive the daily table of contents via e-mail at <http://listserv.access.gpo.gov>. Local notices to mariners are only available online (the Coast Guard stopped printing and mailing paper copies in 2004) and can be viewed at the Coast Guard Navigation Center (<http://www.navcen.uscg.gov/LNM>).

Sectors also typically include information about temporary field regulations in their broadcast notice to mariners (BNM) on VHF-FM Channel 16. BNMs are broadcast on a daily schedule and may also be specially broadcast during an event.

So What Happens if Things Go Wrong with a Field Regulation?

A person who violates a Coast Guard regulation may be subject to civil and criminal penalties (see table). But if the Coast Guard makes a mistake in the rulemaking process, then it's possible the regulation cannot be enforced.

Not every un-dotted "i" or un-crossed "t" is enough to invalidate a field regulation, but significant errors can cause a regulation to be unenforceable. The most common problems are in the signature authority and in the description of the regulated area.

If a field regulation is published with a "fatal" error, it creates an enforceability problem for the Coast Guard. But a regulatory error does not change the nature of the hazard the field regulation is being implemented to address, nor does it invalidate the captain of the port's inherent authority to order any vessel within the captain of the port zone to stop or move as directed.

About the author:

Since 1999, Kevin d'Eustachio has been part of the Coast Guard in various capacities, including as an intern in the Office of Maritime and International Law, active duty judge advocate (lawyer) at the Maintenance and Logistics Command (Atlantic), and HH-65 helicopter pilot at Air Station Atlantic City. He now works as a civilian attorney in the Office of Regulations and Administrative Law and at the Legal Service Command as a reservist.

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For Further Reading:

Lubbers, Jeffrey S., *A Guide to Federal Agency Rulemaking* (4th Ed 2006).
Preparation of Field Regulations, COMDTINST M16704.3A.
The Ports and Waterways Safety Act (33 USC §1221 et seq.)
The Administrative Procedure Act (5 U.S.C. §553 et seq.)

PENALTIES FOR VIOLATIONS

Civil penalties for violating a field regulation range from \$110 for anchorage regulation violations up to \$40,000 for violating a regulated navigation area, safety zone, security zone, or Naval Vessel Protective Zone. Certain willful violations can be Class D or Class C felonies, punishable by prison terms of up to six and twelve years, respectively. Violating a special local regulation can also result in action against a mariner's credential.

Regulation Violated Penalty¹

Anchorage	<ul style="list-style-type: none"> • \$110 civil penalty • <i>in rem</i> liability against the vessel²
Safety Zone	<ul style="list-style-type: none"> • up to \$40,000 civil penalty • for willful violations: Class D felony • for willful violation where you carry a dangerous weapon and assault or threaten to assault an officer: Class C felony • <i>in rem</i> liability against the vessel
Security Zone	<ul style="list-style-type: none"> • up to \$40,000 civil penalty • for willful violations: Class D felony • for willful violation where you carry a dangerous weapon and assault or threaten to assault an officer: Class C felony • <i>in rem</i> liability against the vessel
Special Local Regulation	<ul style="list-style-type: none"> • licensed officer: revocation of license due to incompetency or misconduct • unlicensed person in charge of navigation: \$8,000 civil penalty • owner of vessel on board and aware of violation: \$8,000 civil penalty • any other person: \$3,000 civil penalty
Regulated Navigation Area	<ul style="list-style-type: none"> • \$40,000 civil penalty • for willful violations: Class D felony • for willful violation where you carry a dangerous weapon and assault or threaten to assault an officer: Class C felony • <i>in rem</i> liability against the vessel
Naval Vessel Protective Zone	<ul style="list-style-type: none"> • up to \$40,000 civil penalty • for willful violations: Class D felony • for willful violation where you carry a dangerous weapon and assault or threaten to assault an officer: Class C felony • <i>in rem</i> liability against the vessel
Bridge Operating Schedule or Deviation ³	<ul style="list-style-type: none"> • civil penalty up to \$25,000 per day • misdemeanor criminal offense • fine between \$1,000-\$5,000 • up to one year in prison

Endnotes:

¹ Inflation-adjusted civil penalties are authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, and are listed in 33 C.F.R. §27.3. The civil penalties at 33 CFR 27.3 were recently revised at 74 Fed. Reg. 245 (December 23, 2009). The penalties for Class C and D felonies are listed at 18 U.S.C. §3851.

² "In rem" liability means "against a thing," which allows the plaintiff to seize the thing involved in the claim to satisfy the judgment.

³ Bridge civil and criminal penalties are listed at 33 U.S.C. §§495 and 499.

The Federal Register Act (44 USC §1503)

The National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321-4347)

The Congressional Review Act (5 USC §801)

33 C.F.R. sections 100 (Special Local Regulations), 110 (Anchorages), 117 (Drawbridges), 147 (Outer Continental Shelf Safety Zones) and 165 (Safety Zones, Security Zones, Regulated Navigation Areas, and Naval Vessel Protective Zones).

Endnotes:

¹ 72 Fed. Reg. 20278 (January 25, 2007) [USCG-2007-27761].

² 75 Fed. Reg. 7958 (February 23, 2010) [USCG-2009-0883].

³ "Security Zone: Queen of England Visit, Jamestown Island, Va.," 72 Fed. Reg. 20051.

⁴ "Special Local Regulations for Marine Events; Chesapeake Bay Bridges Swim Races, Chesapeake Bay, Md.," 72 Fed. Reg. 25202.

⁵ Lubbers, Jeffrey S., A Guide to Federal Agency Rule-making 190-1 (4th Ed. 2006).

⁶ GPO Circular Letter 609.

FOR MORE INFORMATION:

View regulation-related documents at www.regulations.gov.

The *Federal Register* is available in electronic form at <http://www.federalregister.gov>.

Sign up for the daily *Federal Register* table of contents at <http://listserv.access.gpo.gov/>.

Local notices to mariners are available online at <http://www.navcen.uscg.gov/LNM>.